

# EU EXTERNAL RELATIONS AFTER LISBON

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Conference « Everything you always wanted to know on the Lisbon Treaty (but were afraid to ask) », organised by the Institute for European Legal Studies, ULg

Brussels, Fondation Universitaire, 26 February 2010,

# In pursuit of Visibility, Coherence and Consistency

Inter alia through:

- Single Legal Personality
- Abolishment of pillar structure
- Reinforced external representation
- Coherent policies

Quid: critical assessment on basis of text Lisbon  
Treaty ?

# Single Legal Personality

- Art. 47 TEU: « *The Union shall have legal personality* »
- . Importance
  - Formal recognition by MS of EU as subject of public international law
  - Possibility to contract international rights and obligations (procedure Art. 218 TFEU)
- . Major breakthrough ?
  - NO: Codification
    - EC formal legal personality (Art. 281 TEC)
    - EU functional legal personality (agr. ex. 24 TEU)

# Limited legal personality

EU legal personality now comparable to a State?

- NO: EU (expressly) only limited legal personality:
- cf. *Declaration N° 24 concerning the legal personality of the European Union*

« The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties. »

- Importance of principle of attributed competence

# Principle of attributed competence

REINFORCEMENT and multiple references (before only ex. Art. 5(1)TEC):

Impossible to ignore principle and implications for MS (by ECJ?):

- Art. 4(1) TEU: « *In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.* »
- Art. 5 TEU:
  - « 1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
  - 2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.* »
- + Declaration N° 18 in relation to delimitation of competence
- + other ref.: eg. Art. 6(2) TEU (accession to ECHR shall not affect EU competences); Art. 207(6) TFEU (CCP)

# Multiple actors: EU + MS

IMPLICATIONS: still multiple actors on international scene: EU and MS

Unchanged: 2 Difficult questions remain crucial whenever external action is envisaged:

1. Who is competent for what ?
  - EU ? MS ?
2. What is the nature of the competence ?
  - exclusive/shared/complementary ?

Raises difficult issue of delimitation of competence EU/MS

# Delimitation competence EU/MS

THORNY issues in external relations with respect to delimitation of competence EU/MS:

1. 'Political opportunity' or 'legal issue subject to judicial review' ?

. ECJ (Case 22/70, ERTA, para 70): distinction:

- a. decision on whether or not to act externally = purely political (expediency)
- b. but no political discretion to proceed through EU or MS: judicial review

. In practice often uncertainty: importance of Advisory Opinions (forestall complications  
PIL: new Art. 208 (11) TFEU) + case-law 'Commission v. Council'

2. Who may determine extent of attribution of competence:

ECJ: dynamic interpretation express competence (orig. CCP) + implied powers  
(Quid: constitutional courts MS ?)

3. Need for 'clarification' or 'guidance' in Treaties through a catalogue of competence ?

# Catalogue of competence

NEW: Part 1, Title 1 TFEU: « Categories and areas of Union Competence » (listed in Art. 2-6 TFEU)

. (Before already statements on competence in agreements/IO)

## 1. Clarity ? Yes and no

- Yes: eg. CCP is exclusive competence EU (Art. 3(1)(e) TFEU)
- No: eg. What is precise scope of the concept of CCP (Art. 207 TFEU)?
- What if different policies are involved? (eg. CCP & Development cooperation– special shared competence which may not become exclusive, see Art. 4(4) TFEU)

## 2. Mere codification of case-law ? Yes and no

- Yes: categories inspired by case-law ECJ
- No: Express reference to implied powers reasoning: implications ?  
(eg. Cartagena protocol, Energy Star, Rotterdam Convention cases)

## 3. 'Containing' case-law ? Static versus Dynamic approach

- Anticipation of case-law: eg. Complementary competence, see Article 6 TFEU

Still need for interpretation/clarification by ECJ



# Express external competence

## NEW legal bases

- Neighbourhood policy: Art. 8 TEU
- Humanitarian Aid: (Art. 214 TFEU)
- Solidarity clause (Art. 222 TFEU): MS object of terrorist attack or natural or man-made disaster (EU & MS to act jointly in spirit of solidarity)

## Former legal bases

- CFSP : Art. 24-46 TEU (cf. Later)
- External dimension Area of Freedom, Security and Justice (Art. 77-80 TFEU)
- Research and Technological development and Space (Art. 186 TFEU)
- Environment (Art. 191(4) TFEU)
- Common Commercial Policy (Art. 206-207 TFEU): NEW content & procedure
- Development cooperation (Art. 209 TFEU)
- Economic, Financial and Technical Cooperation with third countries (Art. 212-213 TFEU)
- Restrictive measures (Economic/financial sanctions) (Art. 215 TFEU)
- Association agreements (Art. 217 TFEU)
- Monetary policy (Art. 219 TFEU)

# Express 'implied' competence

- Art. 216(1) TFEU: « *The Union may conclude an agreement with one or more third countries or international organisations* »:
  1. « *where the Treaties so provide* »: cf. before legal bases express external competence
  2. « *or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties* »:
    - codification of Implied powers re Opinion 1/76
    - Quid Art. 352 TFEU (ex. Art. 308 TEC)?
      - .NOT in relation to CFSP (Art. 352(4) TFEU); CFSP agr. Express in Art. 37 TEU
      - .not to attain sole Art. 3(1) TEU objective (Declaration N°41);
      - .not to widen scope of EU competence (Declaration N°42)
  3. « *or is provided for in a legally binding Union act* »
    - codification of Implied (?) powers re Opinion 1/94
  4. « *or is likely to affect common rules or alter their scope* ».
    - codification of Implied powers re ERTA Case

# Abolishment pillar structure

- **Art. 1, para 3 TEU:** « The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community. »

Q: at least EU now sole actor (besides MS) on international scene ?

A: Need for distinction between external and internal projection:

EXTERNAL projection (relations with the wider world): YES: 1 entity (EU) with consistent objectives

- EC is formally and automatically replaced by EU (Art. 1, para 3 TEU)
- EU clear objectives in external relations: Art. 3(5) TEU & Art. 21(2) TEU
- Clarified that those objectives (incl. formerly sole CFSP obj.) are now common to all EU external action: Art. 21(3) TEU and Art. 205 TFEU
- Common procedural provision for conclusion of all EU agreements (incl. Agr. Relating principally or exclusively to CFSP): Art. 218 TFEU  
(subject to special provisions for CCP, Art. 207(3) TFEU)

# Treaty structure external relations

INTERNAL projection: more complex

Restructuring Lisbon Treaty: EU external relations grouped together & made more visible

But (significantly) split in 2 big parts:

1. Title V TEU: « General Provisions on the Union's external actions and special provisions on CFSP »
2. Part V TFEU: « External action by the Union »

CFSP to be distinguished from other EU external action ?

- Re-insertion of a 'horizontal' (/ 'vertical') pillar: Art. 24 TEU

# Remains of CFSP 'pillar'

- Art. 24 TEU: « 1. The Union's competence in matters of common foreign and security policy shall cover **all areas of foreign policy** and all questions relating to the **Union's security**, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to **specific rules and procedures**. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. **The Court of Justice of the European Union shall not have jurisdiction** with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union. »

# Basic principles CFSP

- Covers ALL areas of foreign policy & questions of Union's security ('..might lead to a common defence')
- Is subject to specific rules & procedures: (essentially inter-governmentalism prevails)
  - Unanimity in European Council & Council (Art. 31 TEU: constructive abstention, NEW QMV enabling clause (3))
  - No legislative acts; virtually no role EP (contrary to eg. CCP – NEW Art. 207(2) TFEU)
  - Put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and the MS (instead of by Commission)
- ECJ virtually no jurisdiction, except for
  - . Art. 40 TEU (cf. later) and
  - . restrictive (and financial sanctions) measures against individuals under Art. 263 TFEU (reinforcing jurisdiction ECJ eg. Khadi type cases)
  - . Quid Advisory Opinion Art. 218 (11) TFEU ?

# Political versus judicial control

In principle ECJ no jurisdiction for CFSP: Art. 24 (1) TEU, Art. 275 TFEU

Instead: Political control through the Council and the High Representative : Art. 24 (3) TEU

Consequence: CFSP still remains outside the scope of the new and autonomous legal system created by the EC Treaty (Van Gend & Loos) (quid: importance PIL?)

CFSP thus not subject to EU principles of direct effect, primacy and uniform interpretation through the ECJ  
(limited impact of 'Declaration N° 17 concerning Primacy' ?)

For all 'internal' legal implications: crucial to delimit CFSP and other areas EU external action





# Delimitation CFSP–EU external action

- Use of CFSP or other legal basis: no political discretion
- ECJ jurisdiction to monitor compliance with Art. 40 TEU (ex. Art. 47 TEU)
- NEW: CFSP and other EU external action now on equal footing:
  - same legal value (art. 1, para 3 TEU)
  - double test under Art. 40 TEU:
    - §1: CFSP may not encroach on other external acquis
    - §2: and vice versa (NEW)
  - No longer 'hierarchy' between pillars
    - . Was crucial criterion in prior case law to exclude inter-pillar mixity in favour of sole EC (eg. dual use goods cases; Ecowas..)
    - . Mixed 'EU-CFSP' agreements now expressly mentioned in Art. 218(3) TFEU
    - . quid: what new LEGAL criteria ?

Result: Redressing balance in favour of CFSP (& MS)

# Ensuring consistency

- Quid: still need for Commission and Council to 'ensure' consistency between different areas of external action (Art. 21 (3) TEU)
- More specifically: « High Representative of the Union for Foreign Affairs and Security Policy shall ensure the consistency of the Union's external action » (art. 18(4) TEU)
- Solution: 'Double hat' for High Representative:
  - . member of both Council and Commission
  - . appointed and revoked by the European Council (QMV) with the agreement of the President of the Commission (Art. 18(1) TEU)

# The High Representative: a double hat

As a member of the Council (Art. 18(1-3) & 27 TEU):

- . Presides over Foreign Affairs Council (Art. 18(3) TEU)
- . Conducts the CFSP (Art. 18(2) TEU)
- . Represents the EU for CFSP matters (Art. 27(2)TEU)  
incl. negotiations agr. principally or exclusively in CFSP (Art. 218 (3) TFEU)
- . Assisted by a European External Action Service (NEW) (Art. 27(3) TEU) (see also Declarations 13-15)

As a member of the Commission: Art. 17 & 18(4) TEU

- . One of the Vice-presidents
- . Responsible for external relations
- . Bound by Commission procedures only to the extent this is compatible with functions under CFSP (Art. 18(4) TEU)

# Looking under the double hat

## Implications ?

- . Long needed consistency in external action: much welcomed
- . At 'price' of shift towards CFSP (& MS)?
  - . Delimitation CFSP-EU and MS-EU external action under Lisbon: more political, less legal ?
    - . New Art. 40 TEU (cf. before): legal criteria ?
    - . Likelihood of Comm v. Council cases (both represented by High Representative) to safeguard (EC) *acquis* from CFSP or MS influence ?
    - . *Future: emergence of case law EP-Council to safeguard *acquis* (and own role in EU external action eg. in area of CCP (NEW))*

# External representation

- Consistency of external action + visibility = Unity in representation ?
  - External representation after Lisbon rationalised but still not unified:
1. High Representative of the Union for Foreign Affairs and Security Policy
    - . to represent external action of EU in all fields (but not bound by Commission procedures if principally CFSP)
  2. Elected President of the European Council
    - . Shall 'at his level and in that capacity', ensure the external representation of EU in CFSP matters, without prejudice to the powers of the High Representative (Art. 15 (6) TEU)
  3. Member States:
    - . Represent national policy where possible under shared competence or not covered by EU external action
- . Missed Chance to reduce the external representation to 1 EU spokes(wo)man (+ MS) only ?
  - . Practical implications ? Will depend on personalities of High Representative, President of European Council and President of European Commission (no Treaty safeguard)

# Conclusion

CERTAINTY: Reshuffle of cards specifically for EU external action with aim to come to:

1. increased consistency and coherence of all EU external policies
2. enhanced visibility of EU on international scene
3. giving MS a stronger hand in playing the external relations cards ?

Will this be adequate and sufficient for the EU to become a forceful and influential player on the international scene?  
. Too early to tell: much will depend on how the newly distributed cards will also effectively be played